



Fostering A Culture Of Respect For Human Rights Within The Judicial Systems Of the Commonwealth Caribbean

The Honourable Mme Justice Dèsirèe
Bernard, Judge of the Caribbean Court of
Justice

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Remarks

By

The Honourable Mme Justice Dèsirèe Bernard, Judge of the Caribbean Court of Justice,

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The point of departure in any discourse on human rights will inevitably commence from the **Universal Declaration of Human Rights**¹ and on to the twin **International Covenants on Civil and Political Rights**² and **Economic, Social and Cultural Rights**³ ratified or acceded to by member states of the United Nations which have undertaken to give effect to their laudable objectives. The independent states of the Commonwealth Caribbean⁴ are no exception. In addition, a few of these states have also ratified the **American Convention on Human Rights**⁵ with similar objectives.

Recognition of human rights and freedoms is invariably achieved by the ratifying of international treaties and conventions by states eager to be part of an international complying community. However, of more importance and in fact far more difficult to achieve is ensuring respect for these fundamental rights. This difficulty was recognised in the Preamble to *the Universal Declaration of Human Rights* which recites a pledge by member states to “achieve the promotion of universal respect for and observance of human rights and fundamental freedoms,” “and strive by teaching

¹ Adopted by the General Assembly of the United Nations on 10 December, 1948

² Adopted by the General Assembly of the United Nations in 1966

³ Adopted by the General Assembly of the United Nations in 1966

⁴ Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St. Christopher and Nevis, St Lucia, St Vincent and the Grenadines, Trinidad and Tobago

⁵ Adopted by the Inter-American Conference on Human Rights on 22 November, 1969

and education to promote such respect.” *The Covenant on Civil and Political Rights, the American Convention on Human Rights*, and the **Convention on the Rights of the Child**⁶ specifically extract from states parties an undertaking to “respect and ensure” to all individuals the rights contained in those treaties.

In this regard one Caribbean state (Guyana) has expressly provided in its constitution for the establishment of a Human Rights Commission, one of the primary functions being “to advocate and promote respect for, and an understanding of, human rights,” and another being to “educate the public regarding the nature and content of such rights”. Guyana has even expanded the human rights regime by providing for the establishment of individual rights commissions for women, children and indigenous peoples, as well as a tribunal charged with the responsibility of dealing with violations and enforcement of rights covered by the specific commissions. It is expressly stated that every person contemplated by the respective international treaties to which that state has acceded is entitled to the human rights enshrined in the said treaties, and such rights shall be respected and upheld by the executive, legislature, judiciary, organs and agencies of Government and all natural and legal persons.⁷ This constitution has incorporated unique provisions under the heading of “Guiding Principles and Objectives,” which, inter alia, exhort courts to pay due regard to international law, conventions, covenant and charters bearing on human rights when interpreting the fundamental rights provisions.⁸

All of the constitutions of the Commonwealth Caribbean states have enshrined provisions for fundamental human rights and freedoms and the protection afforded to them which were influenced in large measure by the **European Convention for the Protection of Human Rights**

⁶ Adopted by the General Assembly of the United Nations in 1989

⁷ Article 154A of Guyana Constitution

⁸ Article 39(2)

and Fundamental Freedoms⁹. It is impossible due to the constraints of time and space to discuss in depth the wide range of these rights, so the paper will be restricted to a discussion of the right to life, protection from inhuman and degrading punishment, protection of the law, protection from discrimination and equality before the law.

RIGHT TO LIFE AND PROTECTION FROM INHUMAN AND DEGRADING PUNISHMENT

These rights common to all constitutions have given rise to more judicial precedents within the Commonwealth Caribbean than any other being inextricably linked to the death penalty which under the laws of all of the states is the ultimate sanction for a person convicted of the offences of murder and treason. Two constitutions specifically stipulate convictions for these two offences as being exceptions to the right to life.¹⁰ Jamaica while retaining the death penalty has categorised the offence of murder into capital and non-capital offences.

The constitutionality of the death penalty has been challenged in domestic courts at all levels, and for those states which have ratified the *American Convention on Human Rights*¹¹ and accepted the jurisdiction of the Inter-American Court of Human Rights, petitions have been lodged with the Inter-American Commission seeking relief from the death penalty after conviction.

The judgments of the Judicial Committee of the Privy Council (hereinafter referred to as “the Privy Council”) being the highest domestic court of last resort for all but two of the Commonwealth Caribbean states, have ebbed and flowed on the constitutionality of the death

⁹ Signed at Rome on 4 November, 1950

¹⁰ Section 4(1), Antigua and Barbuda; Section 4(1) St Christopher and Nevis

¹¹ Trinidad and Tobago suspended its ratification on 26 May, 1999 over the death penalty issue.

penalty deeming it unconstitutional in the case of *Watson v R*¹² (Jamaica) and constitutional in *Matthew v The State*¹³ (Trinidad and Tobago) and *Boyce and Joseph v R*¹⁴ (Barbados). The variance in the decisions depended on interpretations of the relevant constitutional provisions.

In *Watson*, the Jamaican Government sought to amend statutory provisions for the offence of murder by retaining the death penalty only for capital offences as mentioned earlier, no doubt in an attempt to alleviate the harsh effects of the death penalty which in some quarters could be regarded as cruel and inhuman punishment. Without delving into the intricacies of the arguments, this had the effect of rendering the amending legislation unconstitutional according to the reasoning of the Privy Council since it was not an existing law that had been saved when the Jamaican Constitution came into effect upon the grant of independence.

By contrast the relevant statutory provisions in *Matthew (Trinidad and Tobago)* and *Boyce (Barbados)* were held to be constitutional, being existing laws which were saved under the independence constitutions.

Those states which have ratified the international human rights treaties mentioned earlier, sometimes find themselves in a quandary in relation to their international obligations. It is ironic that Jamaica, which sought to modify the effect of its existing legislation by categorising the offence of murder, found that the effort was unconstitutional. Had it been deemed constitutional Jamaica would have succeeded in a limited way. The minority judgment of the Privy Council in *Watson*, which favoured a different interpretation of the relevant provisions of the constitution,

¹² [2005] 1.A.C 472

¹³ [2004] UKPC 34

¹⁴ [2004] UKPC 34

saw the attempt by Jamaica as a “bona-fide move in the direction of seeking to protect the human rights of individual defendants.”

In the Caribbean the difficulties encountered by a state in honouring its international obligations under treaties which it ratifies may be attributable to indolence or reluctance in incorporating these treaties into domestic law by enactment of specific parliamentary legislation. If they are not, they remain unincorporated (though ratified) and are unenforceable on the domestic plane. Hence a state’s international obligations under an unincorporated international treaty, particularly a human rights treaty ratified for the benefit of a state’s nationals, cannot be enforced on the domestic plane, an inexplicable conundrum which individuals in monist jurisdictions find difficult to comprehend.

Invariably, a person convicted of the capital charge of murder, having exhausted all of the domestic remedies, seeks relief from the death penalty by having recourse as a last resort to the provisions of an international treaty which was ratified by the state for the benefit of its nationals. Although such a person can seek relief under that treaty, time may be unkind as the state is under no obligation to delay execution pending the result of an approach to the relevant body under the international treaty, the same not having been incorporated into the domestic law. This was addressed and discussed in the case of *Neville Lewis v Attorney General of Jamaica and Another*¹⁵ where the Privy council held that when a state acceded to international treaties even though unincorporated into domestic law, and allowed individuals to petition international human rights bodies the protection of the law conferred by the constitution entitled a petitioner to complete that procedure and to obtain the reports of such bodies, and to a stay of execution until the reports are

¹⁵ [2001] 2 AC 50

received and considered. The state, however, is not obliged or bound to accept the recommendations of the treaty body in determining the fate of the convicted person.

This issue arose recently in an appeal to the Caribbean Court of Justice.¹⁶ Incidentally it was an appeal by the Attorney General of Barbados against *Boyce and Joseph*, the same persons referred to earlier who had appealed to the Privy Council a few years before challenging the constitutionality of the mandatory death penalty. In this case the State of Barbados appealed against a commutation of the sentence of death to one of life imprisonment imposed by the Barbados Court of Appeal. Other proceedings had been instituted after the decision of the Privy Council which gave rise to the appeal. The Caribbean Court of Justice was required to determine the effect of unincorporated human rights treaties on the execution of a death sentence, and the relationship between such treaties and domestic law in that regard. The State of Barbados had ratified the *American Convention on Human Rights*, but had not incorporated it into domestic law through its Parliament. The Convention permits every person condemned to death to apply for amnesty, pardon or commutation of sentence, and specifically provides that “capital punishment shall not be imposed while such a petition is pending decision by the competent authority”.¹⁷

The domestic machinery established under the constitution to exercise the prerogative of mercy, after due consideration declined to do so in the petitioners’ favour, and fixed dates for execution of the sentences of death while petitions before the *Inter-American Commission on Human Rights* were still pending. The question for consideration – should the state carry out the sentences bearing in mind the impact which undue delay in the execution of a sentence of death may have

¹⁶ Attorney General et al v Jeffrey & Lennox Ricardo Boyce [CCJ Appeal No. CV 2 of 2005]

¹⁷ Article 4(6)

on a convicted person's protection from cruel, inhuman and degrading punishment guaranteed under the constitution?

The dilemma facing a state in these circumstances is that it has no control over the length of time which a treaty body may take to conclude its deliberations. The dilemma is further compounded by the guidelines issued by the Privy Council in *Pratt v Attorney General of Jamaica*¹⁸ familiarly referred to as the *Pratt & Morgan Guidelines* to the effect that where execution is delayed for more than five years after a sentence of death has been pronounced there would be strong grounds for concluding that an execution after such a delay was an infringement of a condemned person's constitutional right against inhuman and degrading punishment.¹⁹ Those Caribbean states for whom the Privy Council is the court of last resort are caught between striving to comply with the Guidelines on the domestic plane and seeking to permit their nationals to take advantage of the provisions for redress under an unincorporated international treaty which it has ratified on the international plane, placing them in a position akin to the mythological god Janus with two faces each looking in opposite directions, and which as one judgment of the Court aptly suggested as appearing to be schizophrenic.

The Caribbean Court of Justice after consideration of relevant case law on the issue drawn from several jurisdictions of the Commonwealth, reasoned that by ratifying an international treaty, in that case the *American Convention on Human Rights*, the state had thrown a condemned person a lifeline, and queried whether it was fair to yank it away by claiming that the unincorporated international treaty formed no part of the domestic law, and he derived no right from the mere ratification. The Court ultimately based its conclusions on a legitimate expectation of the

¹⁸ [1994] AC 1

¹⁹ In 2002 Barbados amended this constitutional provision to avoid any infringement by providing that any delay in executing a sentence of death imposed on a person shall not be inconsistent with or in contravention of it.

condemned persons fostered by the fact that it was the practice of the Government of Barbados to give an opportunity to condemned persons to have their petitions to international human rights bodies processed before proceeding to execution, and this was regarded as conduct complying with the state's treaty obligations on the domestic plane. In the Court's opinion "to deny the substantive benefit promised by the creation of the legitimate expectation here would not be proportionate having regard to the distress and possible detriment that will be unfairly occasioned to men who hope to be allowed a reasonable time to pursue their petitions and receive a favourable report from the international body. The substantive benefit the condemned men legitimately expect is actually as to *the procedure* that should be followed before their sentences are executed." This notwithstanding, the Court went on to state that protracted delay on the part of the international body in disposing of the proceedings initiated before it by a condemned person, could justify the State despite the existence of the condemned person's legitimate expectation, proceeding with the execution before completion of the international process.

At this juncture it is of interest to mention the case of *Johnson (Errol) v Jamaica*²⁰ which involved a report of the United Nations Human Rights Committee on a communication from a Jamaican convicted of murder who having exhausted all of his domestic appeals petitioned the Committee for consideration based on the fact that Jamaica had ratified the *Optional Protocol to the International Covenant on Civil and Political Rights*. After reviewing the facts and relevant case law the Committee held by a majority, inter alia, that a delay of 51 months in hearing an appeal in a capital case, barring exceptional circumstances, was unreasonably long and was incompatible with article 14(3)(c) of the Optional Protocol; that the death penalty could only be imposed in accordance with the law and as the provisions of the Covenant had not been observed at the trial

²⁰ (1996) 55 WIR 208

and could not be remedied on appeal, the requirements of a fair trial (article 14 of the Covenant - right to a fair hearing) had not been satisfied and there had accordingly been a breach of article 6 of the Covenant (the right to life).

PROTECTION OF THE LAW

This term lends itself to a wide, varied interpretation and definition, and can embrace a multitude of rights which demand protection under the laws of a particular state. The constitutions of the Commonwealth Caribbean enshrine provisions to secure protection of the law for persons charged with a criminal offence, for example, the presumption of innocence, the right to be informed of the nature of the offence, the right to defend oneself in person or by a legal representative, the right to a fair hearing within a reasonable time by an independent and impartial court or tribunal, and protection of all other rights connected therewith.

Effective protection of human rights depends on the availability at all times of access to competent, independent and impartial courts of law which administer justice fairly in keeping with constitutional provisions complying with the *International Covenant on Civil and Political Rights*²¹ and the *American Convention on Human Rights*.²² The concept of a fair trial which is an absolute right does not lend itself to a precise or specific definition, but involves several components.²³ Violation of the rights mentioned earlier may result in a trial being regarded as unfair. The presumption of innocence in relation to anyone charged with a criminal offence is the bedrock of the common law and the cornerstone on which the adversarial system in a criminal

²¹ Article 14

²² Article 8

²³ See the recent decision of the Caribbean Court of Justice in *The Queen v Mitchell Lewis* [2007] CCJ 3 (AJ)

trial is built. No burden is placed on an accused person to prove his innocence. The accuser must prove all allegations beyond reasonable doubt although there may be circumstances when this burden shifts.

The right to defend oneself in person or by a legal representative of his own choice guaranteed under protection of the law provisions in Commonwealth Caribbean constitutions gave rise to comparison with the **European Convention on Human Rights**²⁴ when the Privy Council was required to consider the said provision in the constitution of Barbados in *Hinds v Attorney General of Barbados*²⁵. One of the questions which arose for determination was whether the denial of free legal representation had breached the appellant's right to a fair hearing within the constitution. Although the European Convention and the Constitution of Barbados both provide for a person charged with a criminal offence to be permitted to be legally represented, the *European Convention* expanded this to provide that if such a person did not have the means to pay for legal representation it should be provided free when the interests of justice so require. In Barbados legal aid was only automatically provided to persons charged with certain "scheduled" offences, and in complex cases a trial judge could procure the grant of legal aid where it was deemed to be necessary. The Privy Council held that "it was clear that while a defendant was not automatically entitled to legal aid, he was guaranteed a fair hearing", and the provision in the constitution permitting him to be legally represented did not undermine that right.

Another dimension of the constitutional right to legal representation when charged with a criminal offence is the additional right in some of the Commonwealth Caribbean constitutions to hold communication with one's legal representative, a right which the *American Convention on Human*

²⁴ Article 6

²⁵ [2002]2 WLR 470

*Rights*²⁶ guarantees, and which was considered in a case from Trinidad and Tobago, namely, *Mohamed (Allie) v The State*,²⁷ involving exclusion of a confession allegedly made by an accused person without communicating with his lawyer. It was held by the Privy Council, allowing the appeal, that although the right to communicate with a lawyer was fundamental, no absolute right existed as to the exclusion of a confession obtained in breach of that right; however, where disputed facts were established a judge was required to exercise a discretion so as to balance the interest in securing evidence to ensure that justice was done with the need to protect individuals from serious breaches of their constitutional rights. Reference to this was made in a similar case from The Bahamas with a similar constitutional provision – *Simmons v R*²⁸.

PROTECTION FROM DISCRIMINATION AND EQUALITY BEFORE THE LAW

I commence discussion on these two fundamental rights with a quotation from the United Nations Human Rights Committee to the effect that “non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights”²⁹.

The twin international covenants mentioned at the beginning protect both the right against discrimination and the right to equality before the law³⁰, but specific treaties address these two basic human rights affecting specific categories of persons - the **Convention on the Elimination of All Forms of Racial Discrimination**³¹, the **Convention on the Elimination of All Forms of**

²⁶ Article 8(2) (d)

²⁷ [1999] 2 AC 111

²⁸ [2006] UKPC 19

²⁹ General Comment No. 18, in United Nations Compilation of General Comments, p. 134, para. 1

³⁰ ICCPR, Articles 2(1) & 26; ICESCR, Articles 2 (2) & 3

³¹ Adopted by the General Assembly of the United Nations in 1965

Discrimination Against Women³² and the *Convention on the Rights of the Child (supra)* all ratified by most of the Commonwealth Caribbean countries. The constitutions in large measure give effect to the provisions of these treaties in defining discrimination and discriminatory conduct; a few of them contain specific provisions guaranteeing equality before the law. Some may posit the view that the provision against discrimination impliedly ensures equality before the law when it defines discriminatory conduct as being “affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed.”³³ If one is treated differently from others in similar circumstances it follows that you are a victim of discrimination.

Over the years the judiciary in the collective jurisdictions of the Commonwealth Caribbean have been required to interpret and give effect to these constitutional provisions thereby ensuring a varied body of precedent on what constitutes discrimination within the meaning of the relevant statutes, and whether the principle of equality before the law was violated.

An example of a court’s judgment on the discrimination provision in a constitution is the case of *Neilsen v Barker and Another*³⁴ from Guyana which concerned the deportation of a Danish prohibited immigrant to his place of birth to face imprisonment for crimes committed there. On appeal from an order for his deportation he claimed that he had been discriminated against contrary to the discrimination provision in the constitution in that he had been detained when no steps had been taken against others who had been convicted of offences committed abroad. The Court of Appeal in dismissing his appeal held that the constitutional protection against discrimination (Article 149) had to be construed strictly as being limited to protection against discrimination in

³² Adopted by the General Assembly of the United Nations in 1979

³³ Descriptions by sex, gender, pregnancy, marital status, age, disability, religion have been included in some constitutions.

³⁴ (1982) 32 WIR 254

relation to matters of race, place of origin, political opinions, colour and creed; the applicant had not shown that he had been discriminated against in respect of any such matters and accordingly, he could not claim a breach of his constitutional rights under Article 149. By an amendment to that provision of the constitution in 2003, the category of matters was enlarged,³⁵ and is an indication that the category ought never to be closed or restricted only to those matters enumerated in the provision.

In *Smith and Another v L.J. Williams Ltd*³⁶ the Court of Appeal of Trinidad and Tobago in interpreting the constitutional provision on the right to equality of treatment from a public authority held that in order for the respondent company to establish that it had suffered a breach of that right contrary to section 4(d) of the constitution, it was not necessary to show that the breach fell within the introductory words of section 4 (“discrimination by reason of race, origin, colour, religion or sex”).

The learned judge at first instance in the same case in discussing section 4(b) of the constitution relating to the right of the individual to equality before the law and the protection of the law expressed the view that the section guaranteed and intended to ensure that where parties are similarly placed under the law they are entitled to like treatment under that law. This right is breached when it can be shown that there was bad faith or hostile intention and a lack of even-handedness in the treatment of the applicant. This reasoning was followed in *Sumayyah Mohammed v Moraine and Another*³⁷ also a case from Trinidad and Tobago which concerned refusal of admission of an Islamic student to a secondary school on the ground that the “hijab” which the student insisted that she must wear due to firm religious beliefs was not part of the

³⁵ Now provides for “age, disability, marital status, sex, gender, language, birth, social class, pregnancy, religion, conscience, belief, culture”

³⁶ (1982) 32 WIR 395

³⁷ (1994) 49 WIR 371

school's uniform. The trial judge found no contravention of that provision in the constitution since it was not shown that there was any bad faith or hostile intention.

ENFORCEMENT OF PROTECTIVE PROVISIONS

All of the constitutions in some form seek to protect the fundamental rights and freedoms enshrined therein by expressly providing for their enforcement and remedies for their violations without which they would be meaningless, thereby rendering the rule of law a mockery. Enforcement and redress are entrusted to the courts acting within their original jurisdiction, and with a mandate to make such orders and give such directions as may be deemed appropriate if satisfied that no other form of redress is available under any other law.³⁸

DEROGATION FROM PROTECTIVE PROVISIONS

International human rights treaties oft times prohibit derogation from certain provisions. The *Covenant on Civil and Political Rights*³⁹ and the *American Convention on Human Rights*⁴⁰ stipulate that there should be no derogation from such provisions as the right to life, the right to freedom from torture, cruel, inhuman and degrading punishment or treatment, inter alia, these being so basic to the inherent dignity of the human persona. At least one constitution of the states under discussion (Antigua and Barbuda) expressly prohibits derogations from any of the fundamental rights and freedoms recognised therein.⁴¹

³⁸ This provision was removed from the Constitution of Guyana, and there is no longer a bar to seeking redress under any other law.

³⁹ Article 4(2)

⁴⁰ Article 27(2)

⁴¹ Section 19

Some derogation is nevertheless permissible during a period of public emergency which threatens the life of a nation and which is officially proclaimed. Such “public emergency” may include a state of war or the result of a natural disaster or other calamity, and is so defined in all of the constitutions. “Saving of existing law” provisions can be found in all of them to the effect that nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any of the fundamental rights and freedoms provisions. In some of the constitutions the right to life provisions and the freedom from inhuman or degrading punishment or treatment are excepted while in others there are no exceptions. This means that during a proclaimed period of public emergency some or all of the fundamental rights and freedoms may be suspended. However, even in times of public emergency there are certain inherent rights which ought not to be derogated from because of their fundamental character and indispensability, for example, the right to a fair trial and the right to be tried by an independent and impartial tribunal. Most of the constitutions expressly provide for preservation of these fundamental rights of persons detained during a state of public emergency. Of necessity, the permissible derogation from the enshrined fundamental rights can only prevail for the duration of the public emergency, and the proclamation declaring the state of such emergency may remain in force for specified periods of time provided in the constitution.

RESPONSIBILITIES OF THE JUDICIARY AND LEGAL PROFESSION

The executive and the legislative branches of a state exercise their mandate and discharge their responsibilities to the citizens of the state by ratifying treaties and enacting legislation to protect fundamental human rights and freedoms, but the judiciary breathes life into the constitutional provisions and makes them effective and meaningful in keeping with the mandate entrusted to it

under the original jurisdiction of the courts. In discharging this mandate, whenever competent to do so, the judiciary should pay regard to the international covenants and relevant case law, and within permissible limits give purposive and liberal interpretations of legislation when granting relief for violations of human rights.

Equal responsibility for the development of a culture of respect for fundamental rights and freedoms rests on members of the legal profession who must be prepared to be the guardians and watchdogs of violations and breaches of the rights of the citizenry of a state. The profession must not allow such violations to go unredressed, even if it requires undertaking pro bono representations. A system of legal aid should be established by states to ensure that violations of rights are not overlooked and uncompensated based solely on a person's impecuniosity and financial inability to seek justice in our courts. This is an ever-present obstacle to redress in Caribbean states with low personal incomes and high costs of living. The legal profession in these states owes it to its citizens to ensure respect for rights guaranteed to them under the constitution, and it should spare no quarter in the quest to uphold and preserve these rights.

Fulfilling the commitments under international treaties which they ratify must be the foremost priority of all of the Commonwealth Caribbean states. This involves the formulation of education programmes geared towards raising awareness of and respect for human rights, and discouraging wanton disregard for their infringement.

I conclude this discourse as it began with reference to the *Universal Declaration of Human Rights*, particularly to one of the tenets found in the Preamble – reaffirmation of the faith of the peoples of the United Nations in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women. If collectively the states of the Commonwealth

Caribbean strive assiduously to foster a culture of respect for human rights the laudable objectives of the Declaration will be achieved and the hopes and aspirations of their people realised.